LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 254

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Petitioner,

vs.

MILES LABORATORIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

HENRY J. FROLICH,
17500 Emelita Sreet,
Encino, California
in propria persona.
ENCINO CHEMICALS,
Box 172,
Encino, California.

The Brief Shop, North Hollywood, California

TOPICAL INDEX.

	PAGE
Table of Authorities Cited	ii
Opinions Below	1
Jurisdiction	2
Questions that the Supreme Court of the United States should answer	2
Argument:	
1. Opinions of the Lower Court	3
2. The Judgments in the many Seltzer cases in the past have have been bias and contradictory. In some cases the judgments have been obviously dishonest	5
Conclusion	7
Appendix A	9
Appendix B	11
Appendix C	17

TABLE OF AUTHORITIES CITED.

Miles Laboratories, Inc. v. Frolich, United States Court of Appeals for the Ninth Circuit, No. 17491, 1961 3

Miles Laboratories, Inc. v. Frolich, United States District Court, Southern District of California, Central Division, No. 337-60-MC 3

Miles Laboratories, Inc. v. Frolich, Supreme Court of the United States, No. 812, October term, 1961 8

Miles Laboratories, Inc. v. Bernard M. Paull, d.b.a. Royal Sales Co., in the United States District Court, Northern Dist. of Ohio, Eastern Division, No. 4594, 1935 (unreported) 5

Miles Laboratories, Inc. v. Pepsodent Co., C.C.P.A., 1939, 104 F.2d 205 5

Miles Laboratories, Inc. v. Frank C. Starek, d.b.a. Foam O Seltzer Co., in the United States District Court, Northern Dist. of Ill., Eastern Div., No. 15544, 1938 (unreported) 5

Miles Laboratories, Inc. v. United Drug Co., C.C.P.A., 1940, 112 F.2d 814 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No......

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,

Petitioner,

vs.

MILES LABORATORIES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Henry J. Frolich, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a final judgment of that court affirming a judgment of the United States District Court, Southern District of California, Central Division.

OPINIONS BELOW.

A copy of the Memorandum and Order as issued by the United States District Court is attached to this petition as Appendix A. Confirmation of same was dated Sept. 19, 1962.

A copy of the decision of the United States Court of Appeals affirming that memorandum and order that granted a summary judgment to the Miles Laboratories, Inc. is attached to this petition as Appendix B. Confirmation of this decision was dated April 10, 1963.

The respondent made a motion to dismiss the appeal but that motion was denied. A copy of the order denying the motion to dismiss is attached to this petition as Appendix C.

JURISDICTION.

Jurisdiction of the lower courts was never challenged by the courts or the respondents.

QUESTIONS PRESENTED.

1. Inasmuch as the only reason given by the United States District Court in granting a summary judgment to the respondent was a clearly premeditated act of perjury and that although the appeals court tried to cover up for the lower court, they failed miserably and even then affirmed the lower court decision. This alone should be question enough to have this petition granted.

2. The question is also raised as to whether this petitioner should be denied his rightful damages just because he showed, without a question or doubt, that the lower court judgments of the past regarding these Seltzer cases have been bias, contradictory and in most cases outright dishonest.

QUESTIONS THAT THE SUPREME COURT OF THE UNITED STATES SHOULD ANSWER.

1. When are these rampages of Miles Laboratories, Inc., in their attempt to monopolize the word Seltzer, going to be stopped?

2. Does the Supreme Court of the United States feel that granting a decision in favor of this petitioner without granting damages after breaking him is going to stop Miles Laboratories, Inc. rampages?

3. Does the Supreme Court of the United States feel that BROMO SELTZER should be allowed to compete with ALKA SELTZER when a federal court judge has enjoined Foam O Seltzer for competing unfairly with ALKA SELTZER?

4. Has the constitution of the United States been so completely destroyed that there is no justice left except for the big business special interest groups and the Negroes? As I sit here typing this brief on Flag Day the horrible thought just struck me that there could possibly be more real men among the Negroes than there are among my white co-patriots. What an awful thought.

(Note: This petitioner can prove a solid voting record as a conservative Republican but is a real radical American right now.)

ARGUMENT.

1. OPINIONS OF THE LOWER COURTS.

Although the opinion of the district court is printed in full as Appendix A of this petition, this petitioner wishes to quote here the paragraph which contains the reasons given in granting a summary judgment to the respondent.

> "This court, having heard the prior action, finds that Miles Laboratories, Inc. had probable cause to bring the action. Mr. Frolich stated, in opposition to the motion for summary judgment, that he knew that Miles Laboratories, Inc. did not maliciously bring the prior action."

If the judge, in saying that he had heard the prior action (No. 337-60MC), had heard his own opinion of that case he would have seen how clearly he showed that there was no probable cause and this petitioner quotes from his own opinion.

> "The court holds that the name Milk O Seltzer does not infringe the trade mark Alka Seltzer."
>
> "The only genuine similarity between them is the use of the word "seltzer" as the last syllable of both. ..... such similarity is not uncommon in drug compounds. The

word "seltzer" is not registerable since it is a descriptive word. It was specifically disclaimed in Miles Laboratories, Inc. original registration."

"There is no possibility that any purchaser might confuse the two products as now packaged if they were both seen at the market place."

Please remember that these are the exact words of the same judge of the U.S. District Court who granted the respondent a summary judgment without giving this petitioner a hearing on his damage suit stating that there was probable cause for the respondents actions against this petitioner.

Regarding the other sentence of that paragraph

"Mr. Frolich stated, in opposition to the motion for summary judgment, that he knew that Miles Laboratories, Inc. did not maliciously bring the previous action."

This petitioner will now show why he feels that the district court judge did, in that statement, commit an act of premeditated perjury.

This petitioner will admit that he became confused in the oral hearing on the motion for summary judgment and left out the word "criminal" which should have preceded the word malice in a sentence that went like this,

"Now I am not going to try to prove in court that there was any malice by the directors of the Company."

This oral statement should have been stated,

"Now I am not going to try to prove in court that there was any criminal malice by the directors of the company."

This petitioner did not at that time want to swear out warrants for their arrests and throw this civil action into criminal court.

This petitioner, a short time later in the same hearing, tried to correct that statement but when this petitioner came to the word malice, the judge cut this petitioner off cold and said that he knew what this petitioner meant and closed the hearing abruptly.

The foregoing shows the premeditation of the district court judge's statement and in the fact that my whole set of briefs,

including the affidavit in objection to the summary judgment, charges and proves nothing else but malicious prosecution and malict aforethought makes the judge's statement a case of perjury.

(b) Although the appeals court tried as best they could to cover up for the lower court, failed miserably and still affirmed the lower court decision.

2. THE JUDGMENTS IN THE MANY SELTZER CASES IN THE PAST HAVE BEEN BIAS AND CONTRADICTORY. IN SOME CASES THE JUDGMENTS HAVE BEEN OBVIOUSLY DISHONEST.

In argument to this question the petitioner wishes to pick four of the many cases in which the respondent attacks people and companies in Federal courts and in the U.S. Patent Office on their use of the word seltzer in their marks.

1. *Miles Laporatories, Inv.* v. *Frank C. Starek, d.b.a. Foam O Seltzer Co.*, U.S. District Court, Northern District of Illinois, Eastern Division, No. 15544, 1938 (unreported).

2. *Miles Laboratories, Inc.* v. *Bernard N. Paull, d.b.a. Royal Sales Co.*, U.S. District Court, Northern District of Ohio, Eastern Division, No. 4594, 1935. (unreported) (re. Helth O Seltzer)

3. *Miles Laboratories, Inc.* v. *United Drug Co.*, C.C.P.A., 1940. 112 F. 2d 205 (Rex Seltzer)

4. *Miles Laboratories Inc.* v. *Pepsodent Co.*, C.C.P.A., 1939. 104 F. 2d 205. (Pepso Seltzer).

Your Honors can see that there is no possible confusion or similarity between the suffix words ALKA, FOAM O, HELTH O, REX, PEPSO or MILK O. It is obvious that the respondent is bringing these actions into court based solely on its opponents use of the word Seltzer in their marks.

Miles Laboratories, Inc., with their mark ALKA SELTZER, are the same people who, in 1930, stepped in on the then forty-one-year-old and even world famous mark BROMO SELTZER and in

applying for registration of their mark ALKA SELTZER in the U.S. Patent Office stated under oath,

> "—has adopted and used the trademark shown in the accompanying drawing, no claim being made to the word "Seltzer" apart from the mark as shown in the drawing,—"

this was in the registration #283,831 granted to them in June of 1931.

The respondent, Miles Laboratories, Inc., has admitted in writing that they knew that this disclaimer was in effect until 1949. They also said that in 1949 they reregistered the mark ALKA SELTZER and that this disclaimer was not then required nor was it submitted. Naturally in 1949 that disclaimer was not necessary. By that time there were probably more trademarks with the word seltzer in them than there were different kind of aspirin tablets on the market.

Five of the six cases that Miles Laboratories, Inc. brought up as the only real argument for the summary judgment were instigated by the respondent before 1949. It appears to this layman that the respondent is laughing right in the faces of these lower court judges.

This petitioner need not go deeply into the question of bias but will only cite the fact that apparently the only cases in which Miles Laboratories won were against persons or companies with much less money to play with than they have such as Frank Starek and Bernard N. Paull but when they attacked the powerful Pepsodent Co. and the United Drug Co. they lost. This petitioner does not know, in that all of these cases are conveniently unreported, whether the respondent tried the large Sterling Drug Co. on for size but they have a product on the market called FIZZRIN INSTANT SELTZER so if this respondent did attack them, they obviously lost.

Your Honors and this petitioner both know that FOAM O SELTZER sounds almost exactly like BROMO SELTZER, but BROMO SELTZER did not sue FOAM O SELTZER but ALKA SELTZER did claiming that FOAM O SELTZER was competing unfairly with ALKA

SELTZER while ALKA SELTZER was at that time, and is now, competing with BROMO SELTZER. The funny part of that is that a federal court judge ordered FOAM O SELTZER off the market as competing unfairly against ALKA SELTZER. If that is not malicious prosecution and malice aforethought then there are no such words. If a judge in the middle ages were caught meting out that kind of justice, he would get his own head chopped off with a cleaver. In this day of modern justice the respondent is using this as his only argument against this petitioner's damage suit, except that they claim that in the fact that Miles Labs acted with advice of counsel they should be absolved of all responsibility. To this layman this sounds funnier than their other arguments.

This petitioner would like the respondent to answer this question: "Why did Miles Labs not sue Alka Zane and Bromo Seltzer for competing unfairly with Alka Seltzer when they are both very similar products to 'Alka Seltzer?'"

The only infringement possible would be that all of the seltzer products, including this petitioner's, are competing unfairly with our own great grandmother's Arm and Hammer, aspirin and lemon juice home remedy, which they claimed would cure everything from dandruff to athlete's foot, bless their very dear souls.

CONCLUSION.

This petitioner has shown that the attacks by the respondent upon the petitioner in federal court and in the patent office were clear cases of malicious prosecution and that there was no probable cause for such actions and that even from the very beginning, when ALKA SELTZER jumped in on the similar products ALKA ZANE and BROMO SELTZER, the respondent's actions have been with malice aforethought.

The respondent held up the registration in the U.S. Patent Office of the petitioner's trademark for over three years.

This petitioner, at the time of the attack, had more than sixty people who were interested in investing ten thousand dollars or

more each into his product. When the respondent's action hit, everything immediately collapsed as would be expected and the petitioner had to fight the thing alone. This has left this petitioner completely broke and in debt over his head, without job or income, and with a wife who has gone blind during this action. This last sentence is not a request for a t.s.t., good for one big cry on a Red Cross Colonel's shoulder.

This petitioner wishes to make it very clear right now that he is not presenting this petition as a joke. The humorous quips are in there to keep this layman from having a nervous breakdown.

Although the appeals court stated that the petitioner did not make a prayer, he did but wishes to restate that prayer to clarify it.

I, Henry J. Frolich, do pray for relief: in the amount of one million twenty six thousand four hundred dollars or any other reasonable amount that this court deems proper.

This Supreme Court of the United States judged unanimously in favor of this petitioner in case No. 812, October term 1961.

In granting a summary judgment to the respondent, the lower courts have not given fair consideration to the petitioner's damage suit.

Respectfully submitted.

HENRY J. FROLICH,
17500 Emelita Street,
Encino, California,
d.b.a.
ENCINO CHEMICALS,
Box 172,
Encino, California.

APPENDIX A.

(Title of District Court and Cause)

No. 62-714 MC

MEMORANDUM AND ORDER

This cause having come before the court on August 20, 1962, for hearing on defendant's motion for summary judgment, the plaintiff appearing in propria persona and the defendant being represented locally by Lyon & Lyon, Reginald E. Caughey, appearing; and the court having read the written briefs and having heard the oral arguments and the matter having been submitted;

IT IS ORDERED that the defendant's motion for summary judgment is hereby granted.

The plaintiff has, in substance, attempted to bring an action against Miles Laboratories, Inc. for malicious prosecution. Jurisdiction is based on diversity of citizenship. Miles Laboratories, Inc. brought suit in 1960 before this court to enjoin Henry J. Frolich, the plaintiff in the present action, from using the trademark "Milk-O-Seltzer." Miles Laboratories owns the trademark "Alka-Seltzer." This court held for Henry J. Frolich (195 F. Supp. 256). The holding was affirmed by the Ninth Circuit (296 F. 2d 740) and the Supreme Court denied certiorari (366 U.S. 865).

The only question of fact which is raised by the pleadings is whether Miles Laboratories, Inc. brought the prior suit without malice and with reasonable cause. It is the rule of law that if the plaintiff, in bringing the prior action, acted with probable cause and without malice, he is not liable for malicious prosecution.

A. Eastin v. The Bank of Stockton, 66 Cal. 123 (1884). Merely because the prior action was unsuccessful is insufficient to establish want of probable cause. *C. D. Lotts v. Bob Whitworth*, 76 Cal. App. 2d 601 (1946).

This court, having heard the prior action, finds that Miles Laboratories had probable cause to bring the action. Mr. Frolich stated, in opposition to the motion for summary judgment, that he knew that Miles Laboratories, Inc. did not maliciously bring the prior action.

IT IS FURTHER ORDERED that counsel for defendant prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with Local Rule 7.

The clerk of this court is directed to mail copies of this order to all counsel.

Dated: August 29, 1962.

M. D. CROCKER
United States District Judge

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Plaintiff-Appellant,
vs.
MILES LABORATORIES, INC.,
Defendant-Appellee.

No. 18,279
April 10, 1963

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: BARNES, MERRILL and BROWNING, *Circuit Judges*.

BARNES, *Circuit Judge:*

This is an appeal from the granting of a summary judgment by the trial court. It is a diversity case. (Facts supporting diversity jurisdiction were pleaded, but not that it was such a case.) Defendant-appellee herein originally (in another action) sued plaintiff-appellant herein to enjoin Frolich's use of the trademark "Milk-O-Seltzer," alleging infringement with Miles Laboratories' "Alka-Seltzer" trademark. The district court found no infringement (195 F.Supp. 256). This court affirmed in a split decision (296 F.2d 740). Petition to the Supreme Court of the United States for certiorari was denied (369 U.S. 865).

Frolich then filed this "damage suit" against Miles Laboratories, arising from the unsuccessful action for infringement filed by Miles Laboratories, and the cost to Frolich of defending that suit, both in "valuable time and much money." Frolich "prays" for no relief, but his complaint asks for over a million dollars in

damages, and contains a "Conclusion".[1] Appellant Miles Laboratories, Inc., pleaded in defense:

(a) Its previous successful attacks, either in the courts or before the Patent Office, on the use, as an infringing use, of "Carba-Seltzer" (*Miles v. Goodfriend*, 1955, 106 U.S.P.Q. 336); "Foam-O-Seltzer" (*Miles v. Starek*, N.D.Ill., No. 15,544, 1938); "Vita-Seltzer" (*Miles v. Vita-Seltzer Co.*, 1941, 48 U.S.P.Q. 427, 1943, 51 F.Supp. 430); "Premo-Seltzer" (*Miles v. Blackman & Blackman*, 1935, Sup. Ct. N.Y., No. 11,704); and that it filed opposition to the registration of "Pepso-Seltzer" which was unsuccessful and dismissed. *Miles Laboratories v. Pepsodent*, 1939, 104 F.2d 205.

(b) That it had "probable cause" in initiating civil proceedings, without any request for restraining orders;

(c) That it had a lack of malice.

In support of its motion for summary judgment based upon the failure of plaintiff to set forth a cause of action, and the lack of any genuine issue of fact, Miles Laboratories alleged:

(1) It had probable cause to believe it had a cause of action;

---

[1] "CONCLUSION"

"The Defendant has broken almost every Law of justice ever dreamed of in these United States.

If people like Miles Laboratories, Inc., would be allowed to continue these unlawful actions against the citizens of the United States at random on such stupid and childishly ridiculous charges as the Defendant sued the plaintiff on, we the people of the United States have already lost our freedom.

Plaintiff repeats again. How of all people the Miles Laboratories, Inc., who took the 'Alka' from 'Alka Zane' and the 'Seltzer' from 'Bromo Seltzer' and almost overnight created a multi-million dollar business in the dead of the depression, could sue the Plaintiff for his use of the very common word 'Seltzer' is beyond any normal comprehension.

ENCINO CHEMICALS
By HENRY J. FROLICH
Owner"

(2) it had sought to adjudicate its claim to trademark protection only;

(3) it acted upon advice of counsel;

(4) it acted without malice;

(5) it had successfully prosecuted at least six somewhat similar trademark infringement cases, some of which were enumerated in its answer;

(6) this court had affirmed the trial court, but by a split decision.

The court below made Findings as to jurisdiction, the nature of the pending action (for malicious prosecution) based on the action allegedly wrongfully filed (for trademark infringement and unfair competition); that the Miles Laboratories had probable cause and acted on advice of counsel; and that "plaintiff appearing in propria persona stated orally in opposition to the motion for summary judgment that he knew that Miles Laboratories, Inc., did not maliciously bring the prior action that he was not relying upon malice to prove his cause of action."

"FINDINGS OF FACT"

1. That the plaintiff is a citizen of the State of California and a resident, and resides in the Southern District of California, Central Division; that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Indiana and is a citizen of said State.

2. That the Court has jurisdiction of the action by virtue of the diversity of citizenship of the parties and the fact that the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs.

3. That the action herein is in substance an action for malicious prosecution because of the filing and prosecution of a previous action for trademark infringement and unfair competition entitled *Miles Laboratories, Inc. vs. Henry J. Frolich d.b.a. Encino Chemicals* Civil Action No. 337-60-MC Southern District of California, Central Division.

4. That said Civil Action No. 337-60-MC was an action for infringement of the registered trademark ALKA-SELTZER by Miles Laboratories, Inc. for a medicinal remedy for headache and upset stomach, and for unfair competition because of the sale by the plaintiff herein of his product for a

As Conclusions of Law, the court found defendant had probable cause to seek to adjudicate its claim; that there was no malice; and no other material fact at issue.[3]

Plaintiff-appellant has throughout all litigation mentioned herein acted as his own attorney. He has done this shrewdly, and at least during part of it, successfully. At the hearing below of

---

medicinal remedy for headache and upset stomach which he sold under the trademark MILK-O-SELTZER.

5. That the Court held for said Henry J. Frolich 195 Fed. Sup. 256 in said action No. 337-60-MC and refused to enjoin his sale of his prouct sold under the trademark MILK-O-SELTZER; that the holding of the Court was affirmed by the Court of Appeals for the 9th Circuit 296 Fed (2) 740, and certiorari denied by the Supreme Court of the United States 369 U. S. 865.

6. That the only question of fact which is raised by the pleadings is whether Miles Laboratories, Inc., the defendant herein, brought the prior suit without malice and with reasonable cause.

7. That this Court having heard the prior action, finds that the defendant, Miles Laboratories, Inc., had probable cause to bring the action.

8. That the affidavit of Lewis F. Bonham filed in support of defendant's motion for summary judgment, states that said action, No. 337-60-MC was filed on advice of counsel and for the purpose of determining whether the registered trademark ALKA-SELTZER of the defendant was infringed by the acts of the plaintiff in selling his product under the mark MILK-O-SELTZER and the statements made in said affidavit are not rebutted in any manner in the showing made by the plaintiff opposing said motion.

9. That the plaintiff appearing in propria persona stated orally in opposition to the motion for summary judgment, that he knew that Miles Laboratories, Inc., did not maliciously bring the prior action that he was not relying upon malice to prove his cause of action."

"CONCLUSIONS OF LAW"

"1. Defendant had probable cause for instituting and prosecuting said Civil Action No. 337-60-MC against plaintiff.

2. That the defendant did not bring said action, No. 337-60-MC against plaintiff with malice.

3. That there is no other genuine issue as to any material fact remain-

the motion for summary judgment,[4] he did state:

> "Now I'm not going to try to prove in court that there was any malice by the directors of the company. I intend to prove that they did unjustly sue me . . ."

On oral argument before us, Mr. Frolich first says he did not say he did not intend to rely on malice, but if he did, he did not mean to say that—he intended to say there was no *criminal* malice. Further, that he was cut-off by the trial court when he tried to explain his layman's idea of the difference between "malice" and "criminal malice" in a civil suit "in the nature of a suit for malicious prosecution."

What Mr. Frolich's understanding of the difference might be is of little consequence here, because of the court's finding that probable cause existed for Miles Laboratories' bringing the litigation, and its finding of a lack of malice resting on much more than Mr. Frolich's inadvertent statement.

Mr. Frolich earnestly believes that because he won the first suit that there was no probable cause for Miles Laboratories' bringing it, and that its institution had to be the result of "noncriminal" malice. Not only did the court below find otherwise, but in our opinion it could have found in no other way, on the facts then before it and the applicable law. Rule 56(c) Fed. R. Civ. P. California law is applicable. *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64. *Cf.* Restatement of Torts, Sec. 674, *et. seq. Eastin v. Bank of Stockton*, 1884, 66 Cal. 123, 4 Pac. 1106; *C. D. Lotts v. Bob Whitworth*, 1946, 76 Cal.App.2d 601.

Actions for malicious prosecution are a disfavored action, for reasons of public policy. *Haydee v. Morton*, 1935, 8 Cal.App.2d 730, 48 P.2d 709; *Sebastian v. Crouley*, 1940, 38 Cal.App.2d 194,

---

ing in the action.

4. That defendant is entitled upon this motion for summary judgment to a judgment dismissing the action."

[4]The Transcript of Proceedings on such motion appears in the Transcript on Appeal, pp. 35-40.

202, 101 P.2d 120.

> "There is nothing improper in bringing a civil suit for personal ends, and consequently it is necessary to prove either actual ill will or some ulterior purpose distinct from that of enforcement of the alleged cause of action. Restatement of Torts, Sec. 676.

Witkin, Summary of California Law (6th Ed., p. 669).

Advice of counsel has "the usual effect of supplying probable cause." Restatement of Torts, Sec. 675(b). *Citizens Bank v. Hoffman*, 44 Cal.App.2d 814, 113 P.2d 211.

Mr. Frolich is as wrong now as he was right, in the opinion of the majority of this court, when he was heard on the appeal of the original action. The trial court is as right on this appeal, when it ruled against Mr. Frolich, as it was in the opinion of the majority of this court when it originally favored him.

The summary judgment is *affirmed*.

(Endorsed) Opinion Filed April 10, 1963.

Frank H. Schmid, Clerk.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Appellant,
vs. No. 18,279
MILES LABORATORIES, INC.,
Appellee.

ORDER.

Before: BARNES, HAMLEY and MERRILL, *Circuit Judges*

Despite the representations made to this Court by appellant (appearing in propria persona) in his memorandum in opposition to the appellee's motion to dismiss, second and third paragraphs thereof (to the effect that he is not appealing the Findings of Fact, Conclusions of Law and Summary Judgment filed below, but only the trial judge's preliminary order of August 29, 1962), it appears in the colloquy between the litigants and this Court at the hearing of this motion to dismiss that appellant intends and intended to appeal from the action of the court below in denying him relief.

Under this view of the matter, the motion to dismiss must be, and is, denied. Fed. R. Civ. P. Rule 61. *Lemke v. United States*, 346 U.S. 325.

/s/ STANLEY N. BARNES
/s/ FREDERICK G. HAMLEY
/s/ CHARLES M. MERRILL
United States Circuit Judges

Office-Supreme Court, U.S.
FILED
JUL 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 254

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Petitioner,

vs.

MILES LABORATORIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION.

WILLIAM T. WOODSON,
Prudential Plaza,
Chicago 1, Illinois,
Attorney for Respondent.

WOODSON, PATTISHALL & GARNER,
Prudential Plaza,
Chicago 1, Illinois,
Of Counsel.

THE SOUTHCOTT-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS

	PAGE
I. History Of The Litigation	1
II. Reasons For Not Granting The Petition	2
III. Argument	3
1. The Decisions Below	3
2. The Granting of Defendant's Motion for Summary Judgment Was Proper	5
Conclusion	7

Table of Cases.

Byrnes v. Mutual Life Insurance Company of New York, 217 F. 2d 497 (9 Cir., 1954) 5, 6

Community of Roquefort v. William Faehndrich, Inc., 303 F. 2d 494 (2 Cir., 1962) 6

Crescent Live Stock Co v. Butchers' Union, 120 U. S. 141 4

Hurd v. Sheffield Steel Corp., 181 F. 2d 269 (8 Cir., 1950) 6

Stewart v. Sonneborn, 98 U. S. 187 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 254.

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Petitioner,

vs.

MILES LABORATORIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION.

I.

HISTORY OF THE LITIGATION.

The litigation between the parties arose by the filing by respondent of an action against petitioner for trademark infringement and unfair competition in the Southern District of California.

Respondent alleged that petitioner's trademark MILK-O-SELTZER for a remedy for headache and upset stomach was a colorable imitation of and an infringement of respondent's federally registered trademark ALKA-SELTZER for a

similar product, and that the use of said trademark by petitioner constituted unfair competition with respondent.

The District Court held that there was no infringement nor unfair competition and dismissed the complaint (195 F. Supp. 256). An appeal was filed in the United States Court of Appeals for the Ninth Circuit. The judgment of the District Court was affirmed by a split decision (296 F. 2d 740). A petition for certiorari was filed in this Court based largely upon conflict between the various Circuits on similar trademark questions. The petition was denied (369 U. S. 865). The petitioner thereupon filed a suit against respondent in the Southern District of California for damages in the sum of $1,026,400. Respondent filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The motion was granted. Petitioner filed an appeal in the United States Court of Appeals for the Ninth Circuit. The Judgment was affirmed (316 F. 2d 87).

II.

REASONS FOR NOT GRANTING THE PETITION.

1. There is no conflict with decisions of other Circuits.
2. There is no question of federal law involved which has not been decided by this Court.
3. The decisions below were right.

III.

ARGUMENT.

1. The Decisions Below.

The District Court in granting respondent's motion for summary judgment held:

1. Defendant had probable cause for instituting and prosecuting said Civil Action No. 336-60-MC against plaintiff.
2. That the defendant did not bring said action, No. 337-60-MC against plaintiff with malice.
3. That there is no other genuine issue as to any material fact remaining in the action.
4. That defendant is entitled upon this motion for summary judgment to a judgment dismissing the action.

The Court of Appeals for the Ninth Circuit in affirming the judgment of the District Court in granting respondent's motion for summary judgment said:

> "What Mr. Frolich's understanding of the difference might be is of little consequence here, because of the court's finding 'that probable cause existed for Miles Laboratories' bringing the litigaton, and its finding of a lack of malice resting on much more than Mr. Frolich's inadvertent statement.
>
> "Mr. Frolich earnestly believes that because he won the first suit that there was no probable cause for Miles Laboratories' bringing it, and that its institution had to be the result of 'noncriminal' malice. Not only did the court below find otherwise, but in our opinion it could have found in no other way, on the facts then before it and the applicable law. Rule 56(c) Fed. R. Civ. P. California law is applicable. *Erie R. Co.* v.

Tompkins, 1938, 304 U. S. 64; *Cf.* Restatement of Torts, Sec. 674, *et seq.* *Eastin* v. *Bank of Stockton*, 1884, 66 Cal. 123, 4 Pac. 1106; *C. D. Lotts* v. *Bob Whitworth*, 1946, 76 Cal. App. 2d 601.

"Actions for malicious prosecution are a disfavored action for reasons of public policy. *Haydee* v. *Morton*, 1935, 8 Cal. App. 2d 730, 48 P. 2d 709; *Sebastian* v. *Crowley*, 1940, 38 Cal. App. 2d 194, 202, 101 P. 2d 120.

> 'There is nothing improper in bringing a civil suit for personal ends, and consequently it is necessary to prove either actual ill will or some ulterior purpose distinct from that of enforcement of the alleged cause of action. Restatement of Torts, Sec. 676.'

"Witkin, Summary of California Law (6th Ed., p. 669).

Advice of counsel has 'the usual effect of supplying probable cause.' Restatement of Torts, Sec. 675(b). *Citizens Bank* v. *Hoffman*, 44 Cal. App. 2d 814, 113 P. 2d 211."

This Court in *Stewart* v. *Sonneborn*, 98 U. S. 187, said at page 202:

> "* * * any person believing himself to have a claim against another, having probable cause for such belief, has a right, by law, to sue therefor, subject only, if his claim be adjudged false, to pay the costs of suit."

In *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, this Court said, page 149:

> "And when there is no dispute of fact, the question of probable cause is a question of law for the determination of the court. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194. Want of probable cause and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for a malicious prosecution to recover. So that if probable cause is shown, the defense is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of

malice. If he had probable cause to institute his action, the motives by which he was actuated and the purposes he had in view are not material."

2. The Granting of Defendant's Motion for Summary Judgment Was Proper.

Respondent filed its motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure which provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The motion was supported by an affidavit by the Vice President of the respondent, which stated that the Civil Action was filed without malice and upon advice of counsel. The petitioner offered no affirmative testimony to rebut or discredit this affidavit.

In *Byrnes* v. *Mutual Life Insurance Company of New York*, 217 F. 2d 497, (9 Cir., 1954), on the question of the lack of affirmative evidence to discredit the testimony by affidavit filed in support of a motion for summary judgment it was held, page 501:

> "In the last analysis, there is no general pattern that can be applied. In each case we must determine whether there is a triable issue of fact. One of the general tests applied is this: If the testimony presented by the affidavits is such that a directed verdict would have to be granted, the court is justified in granting summary judgment unless affirmative testimony is offered to discredit the testimony."

It was respondent's position that there was no genuine issue as to any material fact and that respondent was entitled to judgment as a matter of law since it had probable

cause in instituting the initial civil proceedings. The district court so found and so held and the court of appeals affirmed.

In *Community of Roquefort* v. *William Faehndrich, Inc.*, 303 F. 2d 494 (2 Cir., 1962), the Court said, page 496:

> "The purpose of summary judgment is to dispose of cases in which 'there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law.'"

In *Hurd* v. *Sheffield Steel Corp.*, 181 F. 2d 269 (8 Cir., 1950), the Court said, page 271:

> "If it appears from the pleadings, affidavits, admissions or depositions that there is no genuine issue as to any material fact and that the issue is one of law, then if the law so warrants a summary judgment should be entered. The question of the sufficiency of the evidence raises an issue of law and if, under the facts, the court would be required to direct a verdict for the moving party, then a summary judgment should be granted. *Ramsouer* v. *Midland Valley R. Co.*, 8 Cir., 135 F. 2d 101; *Parmelee* v. *Chicago Eye Shield Co.*, 8 Cir., 157 F. 2d 582, 168 A. L. R. 1130; *Sprague* v. *Vogt*, 8 Cir., 150 F. 2d 705; *Eller* v. *Paul Revere Life Ins. Co.*, 8 Cir., 138 F. 2d 403, 149 A. L. R. 1191; *Gifford* v. *Travelers Protective Ass'n*, 9 Cir., 153 F. 2d 209."

In *Byrnes* v. *Mutual Life Insurance Company of New York*, 217 F. 2d 497, (9th Cir., 1954), the Court under the caption—"The Nature of Summary Judgment" said, page 500:

> "The object of the procedure for summary judgment is not *to determine* an issue, but whether *there is an issue* to be tried. *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 8 Cir., 1951, 191 F. 2d 881, 883.
>
> "Against the summary disposition of an issue stands the fundamental right to trial in open court by adversary proceedings, and through testimony adduced therein on the issues tendered. The late Judge Cardozo

has stated in simple, yet classic language, the condition which justifies a departure, under summary judgment, from this principle:

> 'To justify a departure from that course and the ward of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.'
>
> * * * * *
>
> "This and other Courts of Appeals have had occasion to apply the principle readily. They have generally held that if the pleadings and affidavits show that there is no issue as to any fact material to the determination of the question, summary judgment should be granted."

The District Court applied the above rule of law in granting respondent's motion for summary judgment and the Court of Appeals applied the above rule in affirming the District Court.

CONCLUSION.

This litigation is of importance only to the litigants; it is not of such gravity and general importance as to justify a review by this Court.

The petition should be denied.

Respectfully submitted,

WILLIAM T. WOODSON,
Prudential Plaza,
Chicago 1, Illinois,
Attorney for Respondent.

WOODSON, PATTISHALL & GARNER,
Prudential Plaza,
Chicago 1, Illinois,
Of Counsel.

CERTIFICATE OF SERVICE.

I, William T. Woodson, attorney for Miles Laboratories, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of July, 1963, I served the foregoing brief in opposition to the granting of the petition, on the petitioner by mailing three copies in a duly addressed envelope, with first class postage prepaid, to petitioner at 17500 Emelita St., Encino, California.

WILLIAM T. WOODSON,
Prudential Plaza,
Chicago 1, Illinois,
Attorney for Respondent.